IN THE SUPREME COURT OF BRITISH COLUMBIA

In the Matter of the Local Government Act, R.S.B.C. 1996, c. 323, Sections 281 and 282 and in the Matter of Rule 10 of the *Rules of Court*

Citation: ***Langley Township v James,*** 2003 BCSC 1809

Date: 20040105
Docket: L030360
Registry: Vancouver

Between:

The Corporation of the Township of Langley
Petitioner

And

David Abram James and Maureen May James
Respondents

Before: The Honourable Mr. Justice Shabbits

Reasons for Judgment

Counsel for the petitioner:	J. Goulden & P. Craven
Counsel for the respondents:	J.W. Conroy Q.C.
Date and Place of Trial/Hearing:	October 2, 2003 Vancouver, B.C.

[1] Mr. and Mrs. James own a small acreage in the Township of Langley. It is adjacent to Provincial Highway No. 1. Mr. and Mrs. James have lived on this property since about 1990.

[2] At various times since 1992, the James have put up signs on their property facing Provincial Highway No. 1. Except for a political sign erected during a political campaign in the late 1990s, the signs have advertised commercial enterprises and undertakings of others. That advertising related to commercial activities carried out at places other than their own property. Mr. and Mrs. James were paid for the signs. For example, Mr. James' evidence is that a sign that was put up in early 2002 for B & B Tree Services was a sign for which they received the sum of $150 a month from B & B Tree Services.

[3] The petitioner is a municipal corporation under the provisions of the ***Local Government Act***, R.S.B.C. 1996 c. 323. It has enacted Sign Bylaw 1995 No. 3491 which contains this provision:

> 3.4.9 No freestanding sign shall be erected facing Provincial Highway No. 1 except for temporary signs advertising farm produce.

[4] With its petition, the Township of Langley seeks a declaration that the respondents are in breach of s. 3.4.9 of

Sign Bylaw 1995 No. 3491. It seeks to have the respondents enjoined and restrained from using their property except in compliance with the Sign Bylaw.

[5] The Township advanced evidence that the Sign Bylaw was enacted following a telephone survey that showed that Township residents strongly supported the regulation of the size, location, number and appearance of signs within the Township.

[6] Provincial Highway No. 1 differs from other roads within the Township. Provincial Highway No. 1 accommodates traffic passing through the Township. The speed and volume of traffic on Provincial Highway No. 1 greatly exceeds that on local roads within the Township.

[7] The preamble to the Township of Langley's sign bylaw includes this:

> "AND WHEREAS it is deemed desirable:
> - to strike a balance between a clutter free community and effective communication of information by means of signs;
> - to address public safety through regulation of the design, construction and location of signs.

[8] It is the submission of the Township that the prohibition of freestanding signs facing Provincial Highway No. 1 addresses the objectives of public safety and a clutter free

community, and that other provisions of the Sign Bylaw allow for adequate communication of information.

[9] The Township has a large rural and agricultural component, including an area surrounding Provincial Highway No. 1. The Township received submissions addressing the desirability of enacting a Sign Bylaw that supported farm gate sales.

[10] It is the submission of the Township that the proviso within section 3.4.9 of Sign Bylaw No. 3491 permitting "...temporary signs advertising farm produce", (the 'proviso') addresses the objective of supporting farm gate sales.

[11] In December of 2001, Township staff conducted an inspection of the respondents' property. They found that several signs were erected on the property facing Provincial Highway No. 1, in breach of section 3.4.9 of the Sign Bylaw. Township staff advised the respondents that the signs had to be removed. The signs were removed.

[12] In September of 2002, Township staff again attended at the respondents' property, and confirmed that two signs had been erected on the property facing Provincial Highway No. 1, in breach of the same provision of the Sign Bylaw. The

respondents have since refused to comply with the Township's demands to remove the signs.

[13] The respondents submit that s. 3.4.9 of the Sign Bylaw is unconstitutional as it purports to limit the respondents' constitutional right to freedom of expression. They submit that the limit imposed upon them by that provision is not a reasonable limit that can be demonstrably justified in a free and democratic society under s. 1 of the ***Canadian Charter of Rights and Freedoms***.

[14] The issues raised by the respondents are these:

(1) Does the impugned section of the Sign Bylaw limit the respondents' constitutional right to freedom of expression as provided for and guaranteed by s. 2(b) of the ***Canadian Charter of Rights and Freedoms***?

(2) If so, is the provision a reasonable limit that can be demonstrably justified in a free and democratic society under s. 1 of the ***Canadian Charter of Rights and Freedoms***?

[15] There is no doubt but that s. 3.4.9 of the Sign Bylaw limits freedom of expression. However, the first question requires a determination not only that it limits freedom of expression, but a determination that it infringes a right of

expression constitutionally guaranteed by s. 2(b) of the *Charter*.

[16] The Township of Langley refers to *obiter dictum* of our Court of Appeal in *Vancouver (City) v. Jaminer* (2001), B.C.C.A. 240. Madam Justice Newbury wrote this for the Court:

> "[14] The action came on for hearing pursuant to R. 18A in November 1999 before Mr. Justice Lowry. At the outset, it appears the City accepted that the prohibition of roof-top signs infringed on the owners' freedom of expression contrary to s. 2(b) of the Charter. As a result of this concession (which was continued on appeal) the Chambers judge was precluded from the kind of analysis engaged in by McLachlin J. (now C.J.C.) in Committee for the Commonwealth of Canada v. Canada, [1991] 1 S.C.R. 139, at 237-242 with respect to content-based and content-neutral restrictions on free expression. (Obviously, s. 11.1.5 of By-law 6510 falls in the latter category.) Whereas laws aimed at the content of expression will be "usually impermissible," McLachlin J. suggested, a content-neutral restriction "may well not infringe freedom of expression at all." She continued:
>
> > In this case, the jurisprudence laid down in *Irwin Toy* requires that the claimant establish that the expression in question (including its time, place and manner) promote one of the purposes underlying the guarantee of free expression. These were defined in *Irwin Toy* (at p. 976) as: (1) the seeking and obtaining of truth; (2) participation in social and political decision-making; and (3) the encouragement of diversity in forms of individual self-fulfilment and human flourishing by cultivating a tolerant, welcoming environment for the conveyance and reception of ideas. Only if the claimant can establish a link between the use of the forum in question for public expression and at least one of these purposes is the claimant entitled to the protection of s. 2(b) of the *Charter*.
>
> [15] With respect, I suggest that the discussion in the case at bar might have more appropriately and more

expeditiously taken place at this stage - i.e. at the threshold of s. 2(b). The City's concession necessitates a less direct treatment that lends more significance to the case than it deserves."

[17] In ***Committee for the Commonwealth of Canada v. Canada***, [1991] S.C.J. No. 3; [1991] S.C.R. 139 (S.C.C.) McLachlin J (now CJC) wrote this at paragraphs 252 to 257:

"252 . . . The approach I have advocated conforms to the philosophical and doctrinal structures fundamental to free expression which this Court enunciated in Irwin Toy. Moreover, it meets the general requirements for a public forum test which I set out earlier in these reasons. It represents a value-based approach to determining the content of the guarantee of freedom of expression, focusing on the interests served by permitting a particular type of expression in a particular place. It strikes a middle ground between the extremes of the right to expression on all government property and the right to expression on none. The line it draws reflects the purpose of the guarantee of free expression. The guarantee extends only so far as can be justified having regard to these purposes, beyond which the Crown is not called upon to justify its legislation or conduct under s. 1. Claims which clearly do not raise the concerns central to the guarantee are eliminated at the start, avoiding the danger that the right may be trivialized while the burden imposed on members of the public seeking to invoke *Charter* protection is not unduly onerous.

Application of the Test to the Case

253 The first question is whether the purpose of the government officials in refusing the respondents the right to distribute their material and solicit in the airport was to prohibit the expression of particular content, or whether it was directed at consequences of the expression unrelated to its particular content.

254 The evidence is scant as to the purpose of the airport officials. However, their stated policy was to prohibit all political propaganda. Given that there appears to have been no intention to favour one

philosophy or idea over another, I would characterize the restriction as content-neutral, aimed at the consequences of such expression rather than the particular messages communicated.

255 The next question is whether the restriction in question had the effect of limiting expression. I agree with L'Heureux-Dubé J. that it did. I disagree with her, however, that this establishes that s. 2(b) of the Charter has been breached. For the reasons expressed earlier, the test enunciated in Irwin Toy requires a further step to be taken before it can be said that s. 2(b) applies. The limiting effect having been shown, we must ask whether the expression in question promotes any of the purposes of the guarantee of free expression. Is there a link between using airports as a forum for political messages and solicitation, and the values embodied in the pursuit of truth, the participation in political or social issues in the community, or individual self-fulfillment or human flourishing?

256 It is not necessary to go beyond the second value to answer the question. The respondents in this case were seeking to present political views in a location frequented by many members of the community passing *en route* from one place to another, a location which can be considered to be a modern equivalent of the streets and by-ways of the past. This establishes a relationship between the respondents' use of the airport for expression and one of the purposes of the free expression guarantee. I conclude that the government's action constituted a limitation of the respondents' rights under s. 2(b) of the Charter.

257 At this point, the onus shifts to the Crown to establish that the limitation on expression is demonstrably justifiable in a free and democratic society under s. 1 of the Charter."

[18] In ***Irwin Toy Ltd. v. Quebec (Attorney General)***, [1989] 1 S.C.R. 927, Dickson C.J. and Lamer and Wilson JJ, wrote this for the Supreme Court of Canada:

> "52 Even if the government's purpose was not to control or restrict attempts to convey a meaning, the Court must still decide whether the effect of the government action was to restrict the plaintiff's free expression. Here, the burden is on the plaintiff to demonstrate that such an effect occurred. In order so to demonstrate, a plaintiff must state her claim with reference to the principles and values underlying the freedom.
>
> 53 We have already discussed the nature of the principles and values underlying the vigilant protection of free expression in a society such as ours. They were also discussed by the Court in Ford (at pp. 765-67), and can be summarized as follows: (1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed. In showing that the effect of the government's action was to restrict her free expression, a plaintiff must demonstrate that her activity promotes at least one of these principles.

[19] In ***Vann Niagara Ltd. V. Oakville (Town)*** (2002), 214 D.L.R. (4th.), Mr. Justice Borin wrote for the majority of the Ontario Court of Appeal. He said this at para. 19:

> In Irwin Toy, Dickson C.J. observed at p. 968: "'Expression' has both a content and a form, and the two can be inextricably connected." Oakville's sign by-law purports to limit both the content and the form of expression. The prohibition against third party signs constitutes a limit on the content of expression, while the restriction on the size of signs limits the form of expression.

[20] Mr. Justice MacPherson wrote in dissent in ***Vann Niagara Ltd.*** He agreed with the majority that the Oakville bylaw was invalid insofar as it infringed on the freedom of expression of property owners by prohibiting third party signs. Those were defined under the bylaw as being "any sign which directed attention to products, goods, services, activities or facilities which are not the principal products, goods, services, activities or facilities provided in the premises upon which the sign was located". That prohibition was based on content. Although an appeal of the decision was taken to the Supreme Court of Canada, it did not include an appeal of the determination that the third party prohibition was invalid.

[21] Mr. Justice MacPherson's dissent lay in his conclusion that the bylaw was valid insofar as it prohibited billboards larger than 7.5 metres (80 square feet) in sign area. That was a content neutral prohibition. It was a restriction on the form of expression. The appeal to the Supreme Court of Canada related to that issue. In a judgment delivered orally on November 13, 2003, Madam Justice Arbour said this for the Supreme Court of Canada:

> We agree with MacPherson J.A. that the law limiting the size of signs to 80 square feet (7.5 square metres) infringes s. 2(b) of the *Canadian Charter of*

> *Rights And Freedoms* (which is not contested in this Court) but is saved under s. 1 as it minimally impairs the freedom of expression of the respondent.

[22] Mr. Justice MacPherson had also said this at para. 67 of the reasons for judgment of the Ontario Court of Appeal:

> LeBel J. concluded his reasons in *Guignard* with this observation: "It will no doubt be in the respondent's interests to rethink the definition of 'advertising sign', in particular, and more clearly identify the real objectives of the bans imposed" (p. 563). The Town of Oakville will need to engage in a similar exercise. For myself, I would simply say that once it overcomes the drafting problem of over breadth identified in *Guignard* (which relates only to a restriction of the freedom of expression of a property owner), a by-law which restricts third party signs in all other respects should be constitutionally sound, provided there is a clear record demonstrating the pressing and substantial objectives of the by-law, such as community aesthetics and road safety.

[23] That opinion was not the subject of comment by Madam Justice Arbour. She did point out that the premise that the law limiting the size of signs infringed s. 2(b) of the ***Canadian Charter of Rights and Freedoms*** had not been contested in the Supreme Court of Canada.

[24] In ***Guignard v. City of Saint-Hyacinthe*** (2001), 209 D.L.R. (4th) 549, the Supreme Court of Canada declared a provision in a sign bylaw restricting the right to post signs invalid. It concluded the restriction at issue limited a right guaranteed

by s. 2(b) of the *Canadian Charter of Rights and Freedoms*, and that the limitation could not be justified under s. 1 of the *Charter*. LeBel J. noted that although the enactment at issue was arguably justifiable as being one which prevented visual pollution and driver distraction, the enactment did not meet other tests involved in the justification process, including demonstration of rational connection, minimal impairment and proportionality. He noted that the ban was arbitrary, and content based.

[25] But for the proviso, the general prohibition in s. 3.4.9 against free standing signs facing Provincial Highway No. 1 would be a prohibition of a form of expression, and not a prohibition on the content of expression.

[26] The respondents wish to earn income by leasing signs to others. They do not assert that their purpose in erecting billboards is one of the purposes underlying the guarantee of free expression, as defined in ***Irwin Toy*** (supra) or as set out by McLachlin J. in ***Committee for the Commonwealth of Canada v. Canada*** (supra).

[27] Sign Bylaw 1995 No. 3491 allows for the erection of signs throughout the Township. Even though there are other restrictions within the Sign Bylaw as to form, including restrictions relating to location, number and size of signs

corresponding to zoning, other provisions of the Sign Bylaw permit the respondents and others to communicate information by means of signs. There is no evidence that the prohibition against freestanding signs facing Provincial Highway No. 1 infringes upon any protected right of the respondents to effectively communicate information.

[28] In my opinion, there has been no link established between a total prohibition of free standing signs facing Provincial Highway No. 1 and any of the purposes for which there is entitlement to the protection of s. 2(b) of the *Charter*.

[29] I am of the opinion that but for the proviso "except for temporary signs advertising farm produce," s. 3.4.9 of Sign Bylaw 1995 No. 3491 would not infringe the freedom of expression guaranteed by section 2(b) of the *Charter*.

[30] The proviso within s. 3.4.9 of the Sign Bylaw relates to Part 4 of the bylaw. S. 4.2.1 permits the erection of temporary signs advertising farm produce for sale on a farm within the Township. The advertised produce must have been grown on the subject farm, a maximum of two onsite signs are permitted on each street on which the farm borders, and the signs may not exceed 3 square meters (32.3 square feet) in area. The signs may not be erected more than seven days prior to the advertised produce being ripe and ready for sale, and

the signs must be removed at the end of the harvest season or within two days of ceasing to sell the produce being harvested. In no event may the signs remain in place for more than 90 days in any calendar year. In addition, the signs cannot be directly illuminated, and the maximum height and width of any such sign shall be 2.5 meters (8.2 feet).

[31] The proviso within s. 3.4.9 is content specific. The material filed by the Township demonstrates that it wished to permit the promotion of the sale on farms within the Township the produce grown on those farms. That was the reason for the inclusion of the proviso within s. 3.4.9.

[32] In ***Vann Niagara Ltd. v. Oakville (Town)*** (supra), Mr. Justice MacPherson said this:

> . . . I would simply say that once it overcomes the drafting problem of over breadth identified in *Guignard* (which relates only to a restriction of the freedom of expression of a property owner), a bylaw which restricts third party signs in all other respects should be constitutionally sound. . . .

[33] It follows that Mr. Justice MacPherson considered that even if a total prohibition was qualified to address other constitutional considerations, a prohibition could, nevertheless, remain constitutionally sound.

[34] The proviso does result in the respondents being permitted to advertise for sale farm produce that has been grown on their own property. The respondents may have a right protected by s. 2(b) of the Charter to reasonably advertise for sale farm produce grown on their own property. That would not necessarily include a right to advertise with freestanding signs facing Provincial Highway No. 1, nor does it mean that the Township can not regulate signage as to form. There is, however, no evidence that the respondents grow produce, nor is it contended that the proviso was intended to address constitutionally protected rights. In my opinion, it does not do so.

[35] S. 4.2.1 (and therefore s. 3.4.9) permits some third party signs in rural zones. It does not permit others. It permits the advertising of produce grown within the Township, but does not permit the advertising of produce grown elsewhere. It permits the advertising for sale on farms of farm produce, but does not permit the advertising of the same produce if it is for sale elsewhere, either within or without the Township.

[36] I am of the opinion that the proviso within s. 3.4.9 of Sign Bylaw 1995 No. 3491 is an arbitrary and content based restriction on freedom of expression, and for that reason it

infringes upon the respondents' rights under s. 2(b) of the ***Canadian Charter of Rights and Freedoms***.

[37] I am also of the opinion that the infringement can not be justified under s. 1 of the ***Charter***. The proviso is arbitrary and content based. It is not rationally connected to the objectives of the legislation. It rests upon a decision to permit the promotion of some economic activity, but not to permit the promotion of other economic activity.

[38] It was the submission of the Township that if the removal of the proviso would render s. 3.4.9 content neutral and, accordingly, legislation that did not offend s. 2(b) of the ***Canadian Charter of Rights and Freedoms***, that the appropriate remedy is to severe the proviso and declare the proviso invalid. The Township relied on ***Schachter v. Canada*** (1992), 2 S.C.R. 679.

[39] The Township had two objectives in enacting s. 3.4.9. The first was to address clutter and public safety by prohibiting freestanding signs facing Provincial Highway No. 1. The second was to permit limited signage for the promotion of the sale of farm produce grown within the Township. In my opinion, the second objective was clearly secondary to and of far less importance than the first. Severance of the proviso renders s. 3.4.9 completely content neutral. In my opinion,

it can be safely assumed that the Township would have enacted s. 3.4.9 even without the proviso, and that for that reason severance of the proviso is the appropriate remedy.

[40] I declare that the proviso "except for temporary signs advertising farm produce" to be inoperative and of no force or effect.

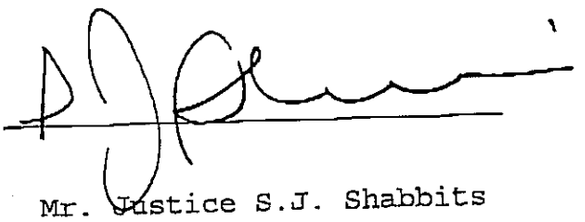
[41] The respondents are not affected by the severance or declaration of invalidity of the proviso. They are in breach of S. 3.4.9 of the Township of Langley Sign Bylaw 1995 No. 3491.

[42] I order that the respondents be enjoined and restrained from using their property located at 26033-56th. Avenue, Aldergrove, British Columbia more particularly described as Parcel Identifier: 010-232-516, Lot 31; Except Firstly: Part shown as highway on Plan 23059 and; Secondly: Part subdivided by Plan 49605; Section 12 Township 11 New Westminster District Plan 2577, except in compliance with the Sign Bylaw.

[43] I order that the respondents remove all signs from their property which are in contravention of the Sign Bylaw.

[44] I order that the respondents be enjoined and restrained from erecting on their property any freestanding signs facing Provincial Highway No. 1.

[45] The relief sought in the petition has been granted only because an offending portion of the Sign Bylaw was severed and declared inoperative. For that reason I order that each party shall bear their own costs.



Mr. Justice S.J. Shabbits